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Supreme Court of the United States

No. 1166 October Term, 1966

H. T. JORDAN, JR., and GERVASE A. BRYANT,

Petitioners,

VERSUS

UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS TENTH CIRCUIT

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Supreme Court of the United States

No. ----------, October Term, 1966

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Petitioners,

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UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS TENTH CIRCUIT

Petitioners, H. T. Jordan, Jr. and Gervase A. Bryant, by their counsel, pray that a writ of Certiorari issue to review the judgement of the United States Court of Appeals Tenth Circuit, affirming the judgment of the United States District Court for the Western District of Oklahoma.

OPINIONS BELOW

The District Court wrote no opinion. The opinion of the United States Court of Appeals Tenth Circuit is appended hereto and is officially reported in 370 F2d 126.

JURISDICTION

The judgment of the United States Court of Appeals Tenth Circuit was made and entered on December 5, 1966. A petition for a rehearing was denied by an order entered on Jaunary 26, 1967. On January 31, 1967, an order was made and entered staying the issuance of mandate, pending the filing, consideration and disposition of this petition, and further, granting these petitioners thirty (30) days time in which to file their petition for a writ of certiorari. That thereafter this Court entered an order, on February 20, 1967, extending the time to file their petition for certiorari to and including March 27, 1967. That petitioners invoke the jurisdiction of this Court under 28 U.S.C. Sec. 1254.

QUESTIONS PRESENTED

1. Where there has been a plain denial to the accused, as contended in the instant case, of the right to be confronted with the witnesses against them at the trial, does this raise a constitutional question of such grave interest and importance that this Court would review the judgment of the lower court?

2. In a constitutional sense, is it not imperative that, as a basis for a fair trial by a jury in a criminal case, the only evidence to be developed against the accused shall come only from witnesses sworn and examined in a public courtroom, where there is full judicial protection of the defendant's constitutional guarantee of confrontation and cross-examination by counsel?

3. Where petitioners, in their petition for a rehearing, for the first time on appeal, did call to the attention of the appellate court that they had been denied the right of confrontation, would this negate any claim that they had waived this constitutional guarantee?

4. Where, as in the instant case, the proceedings in the lower courts had permitted "hearsay evidence" to be considered by the jury as basis for its verdict, would this be such a departure from the accepted and usual course of procedure that this Court should grant certiorari to review the judgments of the lower courts?

5. Is Title 18 U.S.C. 1010 unconstitutional because it failed to clearly identify with certainty the entity sought to be named therein, as being an agency of the United States of America?

6. Is Title 18 U.S.C. 1010 unconstitutional because the provisions of this statute are too vague and too ambiguous, in that the provisions of the statute are absent of any clear cut definition of the wrongful design necessary to form the criminal intent to commit the prohibited offense, thereby permitting the innocent conduct and lawful intent of a person to be declared equally guilty with the wrongdoer with fraudulent and unlawful intent?

STATUTES INVOLVED

TITLE 18 U.S.C. 1010:

> "Whoever, for the purpose of obtaining any loan or advance of credit from any person, partnership, association, or corporation with the intent that such loan or advance of credit shall be offered to or accepted by the Federal Housing Administration for insurance, or for the purpose of obtaining any extention or renewal of any loan, advance or credit, or mortgage insured by such Administration, or the acceptance, release, or substitution of any security on such a loan, advance or credit, or for the purpose of influencing in any way the action of such Administration, makes, passes, utters or publishes any statement, knowing the same to be false, or alters, forges, or counterfeits any instrument, paper, or document, or utters, publishes, or passes as true any instrument, paper or document, knowing it to have been altered, forged, or counterfeited, or willfully overvalues any security, asset, or income, shall be fined not more than $5,000 or imprisoned not more than two years, or both. June 25, 1948, c. 645, 62 Stat. 751.

TITLE 28 U.S.C. Rule 52 (b):

> "Plain error or defects affecting substantial rights may be noticed although they are not brought to the attention of the court."

CONSTITUTIONAL PROVISIONS INVOLVED

FIRST AMENDMENT:

Pertinent provisions as follows:

> "• • • Congress shall make no law • • • abridging the freedom of speech • • •"

FIFTH AMENDMENT:

Pertinent provisions as follows:

"• • • nor be deprived of life, liberty, or property, without due process of law • • •"

SIXTH AMENDMENT:

Pertinent provisions as follows:

"• • • and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him • • •"

STATEMENT

Petitioners were convicted by a jury, on a plea of not guilty, in the United States District Court for the Western District of Oklahoma, on December 9, 1966, on three counts of a twelve count indictment. That Count One, on which they were convicted, charged them with a conspiracy to violate Title 18 United States Code, Section 1010; that Count Six, on which they were convicted, charged them, in substance, with making a false statement to the Federal Housing Administration, an agency of the United States of America, in violation of Title 18 U.S.C., Sections 1010 and 2; that Count Ten, on which they were convicted, charged them, in substance, with having made a false statement to the said Federal Housing Administration, an agency of the United States of America, in violation of said last named sections of said statute; all of which is set forth in detail in the opinion appended hereto and in the nine printed copies

of the record filed in the office of the clerk, pursuant to Rule 21 Paragraph 4 of this Court.

These petitioners were business men engaged in building dwelling units and selling them for homes, under the firm name of Beacon Realty Company. That some of the purchasers borrowed money from local financial institutions, who obtained loan guaranties of the Federal Housing Administration, upon the application of the purchasers.

The indictment does not charge any of these local financial institutions, nor any of the purchasers of these dwelling units, as co-conspirators with these petitioners.

Fourteen overt acts were alleged in the indictment to support the conspiracy count, although none of said acts were wrongful or criminal in themselves.

Count Six charges that Homer H. Hill, Jr. and Thelma Joyce Hill purchased real estate located at 1929 Symphony Lane, Midwest City, Oklahoma, on or about the 13th day of January, 1960, and that petitioners, for the purpose of influencing the Federal Housing Administration, an agency of the United States of America, to insure a loan by the American Mortgage and Investment Company, to the said Homer H. Hill, Jr. and Thelma Joyce Hill, did knowingly and wilfully make, pass, utter and publish and cause to be made, passed, uttered and published to the said Federal Housing Administration, a false statement, namely: that Hill made $7200.00 annually. Whereas, it was alleged, that he made less than $7200.00 annually. (R. 22-34, 74-78).

That Count Ten of the said indictment charged that on or about the 31st day of March 1960, the petitioners, for the purpose of influencing the Federal Housing Administration, an agency of the United States of America, to insure a loan by the Midwest Mortgage Company, Oklahoma City, Oklahoma, to Thomas F. and Winona Jackson, in connection with their purchase of real estate located at 9413 Rhythm Road, Midwest City, Oklahoma, did knowingly and wilfully make * * * and cause to be made * * * to the Federal Housing Administration, false statements, namely: that purchasers intended to trade their equity in certain property and to occupy the premises so purchased, and that said alleged statements were untrue, and that they did not intend to trade their equity or occupy the property; all of which was alleged to be in violation of Title 18 U.S.C. 1010 and 2. (R. 34-46, 114-121)

That during the course of the trial certain "hearsay" testimony was heard and considered by the jury, as a basis for their verdict, without the petitioners coming face to face with their accusers, and without opportunity to cross-examine these witnesses, as for instance, witness for the prosecution Bruce D. Miller, being examined in chief by government prosecutor, Jack R. Parr: (R. 18, 19)

"Q. Explain the communications from the Oklahoma National Mortgage Company. What did they pertain to?

MR. HARRIS: Object to that as incompetent, irrelevant and immaterial. It would not be binding on us.

THE COURT: What is the point Mr. Parr?

MR. PARR: I will approach the bench and state it off the record if you like.

THE COURT: Very well.

(Conference at bench between court and respective counsel, off the record, and open proceedings resumed as follows:)

THE COURT: Overruled

Q. (By Mr. Parr) Did anybody from the Oklahoma National Mortgage Company come out to see you with reference to 1817 Melody Drive property?

A. They called me on the telephone.

Q. What did they say to you?

A. They said the payments were three months behind and if the payments were not brought up to date they were going to start foreclosing proceedings. I made up the points on it, and Mr. O'Toole of the Oklahoma National Mortgage Company suggested that I try to get the deed straightened out, and he gave me a list of the deeds he needed to get it brought up to date and I got them all, made the payments, and the next day he called me and said there was one deed I got when I cleaned this up. He said the deed I gave the Beacon Realty Company had been put up for an $1800.00 loan, and if I would pay the $1800.00 he would give me a clear deed to the property."

Again, on pages 40 and 41 of the printed record, government witness Thomas Franklin Jackson, testifying in chief:

(By Mr. Parr)

"Q. Did you know Mr. Warrington of the Midwest Mortgage Company?

A. Yes, sir.

Q. Did he come to see you?

A. Yes, sir.

Q. What did he say?

A. He asked me if I owned 9413 Rhythm Road and I told him about this equity and I signed the deed over to them, and it was supposed to have been cleared as far as I was concerned.

Q. Did he tell you anything about the 9413 property?

A. Yes.

Q. What did he say?

A. That there was two payments due on this property, and I had a very short period of time to make these two payments or it would go into the hands of the FHA.

Q. Did he mention anything about you living in the property?

A. Yes, sir.

Q. What did he tell you about that?

A. He was rather astounded by the fact I wasn't living in the property and told me I should move in."

Counsel, on appeal, did not urge in his brief in the appellate court this alleged violation of the petitioners constitutional right of "confrontation" with the witnesses against them at the trial. However, in a timely petition for a rehearing, new counsel did raise this denial of a fundamental constitutional right and did call this plain error to the attention of the court and gave the lower appellate court an opportunity to take corrective action. (TR 5)

Count 1 alleges a conspiracy to make false statements which are alleged in Counts 2, 3, 4, 5, 7, 8, 9, 11 and 12. All of these above named counts, except the conspiracy count, are not involved in the instant case, since the petitioners were found not guilty on these nine counts of the indictment.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

In the very beginning, we wish to point out to the Court that a very grave constitutional violation has occurred to these petitioners, in that they were deprived of their constitutional right of "confrontation" with witnesses against them at the trial.

This constitutional guarantee is anchored in the Sixth Amendment to the United States Constitution, which clearly provides that in all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him. This very important constitutional right was violated in prosecuting this criminal case against these petitioners, and "hearsay evidence" was considered against them as a basis for the verdict of guilty.

The decision of the lower appellate court, affirming their conviction, should be reviewed, because the actions of the lower courts were a very serious departure from the accepted and usual course of judicial proceedings.

It is further pointed out that the decision of the lower appellate court, in affirming the judgment of conviction in the lower court against these petitioners, decided a federal question, the "right of confrontation" and the "right of cross-examination" in a way that is in conflict with the decisions of this Court.

This Court has consistently held that the constitutional right of confrontation means that the accused has the right to come face to face with his accusers at the trial, as well as the right of cross-examination of the witnesses against him. In the very recent case of *Pointer v. State of Texas*, 380 US 400, 85 S Ct 1065, 13 L ed 2d 923, which is an applicable case, this Court reaffirmed these basic constitutional rights, and we quote from the body of the decision, beginning on page 403 of the U.S. Supreme Court Reports, as follows:

> "'We hold today that the Sixth Amendments right of an accused to confront the witnesses against him is likewise a fundamental right • • • It cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him. And probably no one, certainly no one experienced in the trial of lawsuits, would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case. See, e.g., 5 Wigmore, Evidence § 1367 (3d ed 1940). The fact that this right appears in the Sixth Amendment of our Bill of Rights reflects the belief of the Framers of those liberties and safeguards that confrontation was a fundamental right essential to a fair trial in a criminal prosecution. Moreover, the

decisions of this Court and other courts throughout the years have constantly emphasized the necessity for cross-examination as a protection for defendants in criminal cases. This Court in *Kirby v. United States*, 174 US 47, 55, 56, 43 L ed 890, 893, 894, 19 S Ct. 574, referred to the right of confrontation as '(o)ne of the fundamental guarantees of life and liberty,' and 'a right long deemed so essential for the due protection of life and liberty that it is guarded against legislative and judicial action by provisions in the Constituiton of the United States and in the constitutions of most if not of all the States composing the Union.' Mr. Justice Stone, writing for the Court in *Alford v. United States*, 282 US 687, 692, 75 L ed 624, 628, 51 S Ct 218, declared that 'the right of cross-examination is 'one of the safeguards essential to a fair trial.' And in speaking of confrontation and cross-examination this Court said in *Greene v. McElroy*, 360 US 474, 3 L ed 2d 1377, 79 S Ct 1400:

> 'They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right "to be confronted with the witnesses against him." This Court has been zealous to protect these rights from erosion.' 360 US, at 496-497, 3 L ed 2d at 1391 (footnote omitted).

"There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal. Indeed, we have expressly declared that to deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law. In *In re Oliver*, 333 US 257, 92 L ed 682, 68 S Ct 499, this Court said:

'A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense – a right to his day in court – are basic in our system of jurisprudence; and these rights include, as a minimum a right to examine the witnesses against him, to offer testimony, and to be represented by counsel.' 333 US, at 273, 92 L ed at 694 (footnote omitted).

"And earlier this Term in *Turner v. Louisiana*, 379 US 466, 472-473, 13 L ed 2d 424, 429, 85 S Ct 546, we held:

'In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the "evidence developed" against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel.'

"Compare *Willner v. Committee on Character & Fitness*, 373 US 96, 103-104, 10 L ed 2d 224, 229, S Ct 1175, 2 ALR3d 1254."

• • •

"(4, 5) Under this Court's prior decisions, the Sixth Amendment's guarantee of confrontation and cross-examination was unquestionably denied petitioner in this case. As has been pointed out, a major reason underlying the constitutional confrontation rule is to give a defendant charged with crime an opportunity to cross-examine the witnesses against him. See, e.g., *Dowdell v. United States*, 221 US 325, 330, 55 L ed 753, 757, 31 S Ct 590; *Motes v. United States*, 178 US 458, 474, 44 L ed 1150, 1156, 20 S Ct 993; *Kirby v. United States*, 174 US 47, 55-56, 43 L ed 890, 893, 894, 19 S Ct 574; *Mattox v United States*, 156 U.S. 237, 242-243, 39 L ed 409-411, 15 S Ct 337. *Cf. Hopt v. Utah*, 110 US 574, 581, 28 L ed 262, 265, 4 S Ct 202; *Queen v. Hepburn*, 7 Cranch 290, 295, 3 L ed 348, 349."

Mr. Justice Stewart, concurring in the result, on page 410, stated:

> "The right of defense counsel in a criminal case to cross-examine the prosecutor's living witnesses is '(o)ne of the fundamental guaranttees of life and liberty,' and 'one of the safeguards essential to a fair trial.' It is, I think, as indispensable an ingredient as the 'right to be tried in a courtroom presided over by a judge.' Indeed this Court has said so this very Term. *Turner v. Louisiana*, 379 US 466, 472-473, 13 L ed 2d 424, 428-429, 85 S Ct 546."

In *Douglas v. Ala.*, 380 US 415, 85 S Ct 1074, 13 L ed 2d 934, the Court, in the seventh paragraph of the Syllabus, held:

> "7. An objection which is ample and timely to bring the alleged federal error to the attention of the trial court and enable it to take appropriate corrective action is sufficient to preserve the claim for review in the United States Supreme Court."

It is pointed out that, over timely objections, the trial court permitted a government witness, a Mr. Bruce D. Miller, to testify to a detailed conversation held over the telephone with some third party, identified by the witness only as a Mr. O'Toole (R. 19). This purported telephone conversation was rank "hearsay evidence" of the most vicious kind, and was highly prejudicial to these petitioners, because the absent and unsworn witness O'Toole, accused these petitioners of an offense other than the offenses named in the indictment,

namely: That these petitioners had put up a deed for a loan for $1800.00, and that it would be necessary for witness Miller to pay the $1800.00 before he could get a clear deed to this property – meaning the property at 1817 Melody Drive, which petitioners had previously sold to Miller. (R. 16-22)

It is seriously urged that these "hearsay statements" were deliberately provoked by the prosecuting attorney at the trial. That these purported facts recited in these various telephone conversations with some third party, were definitely uncommunicated to and unauthorized by these petitioners. That there can be no doubt about these "hearsay statements" being purposely calculated to and did create actual prejudice and bias in the minds of the jury against these petitioners. This prejudicial "hearsay evidence" certainly prevented them from having that fair trial that is the goal in a federal court of justice. The right to confront their accusers face to face was denied to these petitioners. Their right of cross-examination of government witnesses Mr. Warrington (R. 40-41) and Mr. O'Toole (R. 18-19), was denied to these petitioners; yet the jury was allowed to consider the unsworn statements of these witnesses against these petitioners and to use this "hearsay evidence" as a basis for their verdict.

This Court, *In Re Murchison*, 349 US 133, 75 S Ct 623, held, in paragraphs 6 and 9 of the syllabus, as follows:

"6. To perform its high function in the best way, justice must satisfy the appearance of justice." Citing the case of *Offutt v. US*, 348 US 11, 75 S Ct 11.

"9. A defendant's right to examine and cross-examine witnesses is too essential to a fair trial to have that right jeopardized."

These decisions above cited are applicable to the instant case, and they are strongly persuasive on the points of law involved. Therefore, petitioners have clearly established their right to have this Court consider, on review of the decision of the appellate court affirming the judgment of the lower court, these very important constitutional questions of vital public interest.

Next, your petitioners challenge the constitutionality of Title 18 U.S.C. 1010, on these basic grounds:

(1) This statute is believed to be fatally defective and invalid because the provision of this statute do not clearly and understandingly identify the entity, or subject matter, sought to be protected by the enactment of the statute, the entity which in the statute is variously referred to as the "Federal Housing Administration" or simply "Administration". There is positively no provision whatsoever in the statute defining this entity to be an "agency of the United States of America", or any other description or provision stating that the United States has even a proprietary interest in the subject matter thereof. The government has attempted to circumvent this deficiency of the provisions of said statute in drafting

the indictments in question, because in Count 1, Count 6, and County 10, (R. 1, 5 and 8) it is charged in each instance that the subject matter of the said statute is "an agency of the United States of America".

We urge that this fact alone is certainly self-evident that the statute is deficient and invalid because it is too vague and too ambiguous to measure up to constitutional requirements. If this were not true, why was it necessary for the prosecution, in drafting the indictment, to go beyond the language of this statute and charge these petitioners in Count 1, Count 6 and Count 10, with language not found within the four corners of the statute, such as the added language, to wit: "An agency of the United States of America"?

Therefore, the statute and the offenses charged against these petitioners is clearly unconstitutional in that the indictment does not "track" the pertinent language of the statute, and by reason thereof the decision of the appellate court affirming the trial court's judgment of conviction of the petitioners should be reviewed.

(2) This statute is believed to be clearly unconstitutional because the provisions of the statute are too ambiguous in that the provisions of the statute are absent of any clear cut, intelligent and understandable definition of the wrongful design necessary to form the criminal intent to commit the prohibited offense; thereby permitting innocent opinion and lawful intent of a person to be declared equally guilty with the wrongdoer with a fraudulent and unlawful intent.

Compare the inadequate provisions of 18 U.S.C. 1010 with pertinent and valid provisions of 18 U.S.C. 1002, which clearly state the offense and defines the necessary intent, as follows:

> "Whoever knowingly and with intent to defraud the United States or any agency thereof • • •"

By comparing these two statutes, it becomes apparent that Title 18 U.S.C. 1010 is also an unconstitutional abridgment of speech, since the expression of an opinion by the petitioners has subjected them to a criminal prosecution. Likewise, the said statute is an unconstitutional abridgement of petitioners' right to be fully informed as to the exact nature of the offense against them, within the language of the statute, thereby violating their constitutional right as guaranteed to them in the Sixth Amendment.

The word "unconstitutional" as understood by the courts, means that the act assailed is in conflict with some provision of the Constitution; not that it is contrary to sound principles of legislation. *Ketterer v. Lederer*, 269 F 153.

In *Norton v. Shelby Co.*, 118 US 425, 6 S Ct 1121, it was held:

> "An unconstitutional act is not a law. It confers no rights. It imposes no duties. It affords no protection. It creates no office. It is in legal contemplation as inoperative as though it had never been passed • • •"

In *United States v. Hariss*, 347 US 612, 74 S Ct 808, this Court, in the second paragraph of the syllabus, held:

> "2. The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute, the underlying principle being that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.

In *Jordan v. DeGeorge*, 341 US 223, 230, 232, 71 S Ct 703, 707, 708, 95 L ed 886, it was held:

> "The essential purpose of the "void for vagueness" doctrine is to warn individuals of the criminal consequences of their act."

We seriously submit for the consideration of the Court, that these vague and ambiguous provisions of this statute are in such loose and broad terms and so all inclusive, that the statute wrongfully invades the domain of free speech and thereby violates even the First Amendment, which provides that "Congress shall make no law * * * abridging the freedom of speech * * *" The provisions of this statute could very well easily ensnare a person who has done no wrong other than to exercise his constitutional right of free speech to express an opinion. Therein is the difficulty, and a difficulty which is insuperable, because the statute appears to be too all inclusive and would make it criminal to express one's opinion as to the value of a security, or the value of an asset,

or even an estimate of the contemplated annual income of an individual, which is a factual situation in the instant case.

Therefore, it is urged that the statute abridges the freedom of speech. In *Conally v. General Construction Co.*, 269 US 385, 391, 46 S Ct 126, 70 L Ed 322, the test of vagueness was said to be that where the statute in question either forbids or requires the doing of an act in terms so vague that it must be said that men of common intelligence must necessarily guess at its meaning and differ as to its application. Therefore, this statute fails to meet the constitutional requirements of due process of law. See *United States v. Petrillo*, 332 US 1, 67 S Ct 1538, 91 L Ed 1877, to the same effect.

It was stated in *Lanzetta v. New Jersey*, 306 US 451, 59 S Ct 618, 83 L Ed 888, as follows:

> "If on its face the challenged provision is repugnant to the due process clause, specification of details of the offense intended to be charged would not serve to validate it * * * It is the statute, not the accusation under it, that prescribed the rule to govern conduct and warns transgression * * * No one may be required at peril of life, liberty or property to speculate as to the meaning of a penal statute. All are entitled to be informed as to what the state commands or forbids."

To the same effect, see: *Winters v. New York*, 333 US 507, 515, 68 S Ct 665, 670, 92 L Ed 840; *Thomas v. Collins*, 323 US 516, 65 S Ct 315, 89 L Ed 430; *Cantwell v. Connecticut*, 310 US 296, 60 S Ct 900, 84 L Ed 1213.

CONCLUSION

In conclusion, we think that it has been made clear that these petitioners were positively deprived of their constitutional rights of "confrontation" and "cross-examination" of witnesses against them at their trial. There could be no doubt but what this hearsay evidence of these government witnesses purporting to recite various hearsay conversations had over the telephone, or otherwise, with third parties, was highly prejudicial, because these purported statements even accused these petitioners of a serious criminal offense, other than that for which they were on trial. As for instance, O'Toole accused the petitioners of putting up a deed – (meaning to premises at 1817 Melody Drive, which had previously been sold to Miller by petitioners) – for a loan of $1800, and that unless Miller paid the $1800, he could not get a clear deed to this property. (R. 19)

Notwithstanding the above accusation being a fantasy, nevertheless it was a serious and prejudicial charge that could poison the minds of the jury against the accused.

The decisions cited support the contention that these petitioners had a strong constitutional right to confront and to cross-examine the witnesses against them at the trial. This right was positively violated. This denial of confrontation was such a departure from the accepted and usual course of procedure that this Court should grant certiorari to consider these constitutional questions on review of the judgments of the lower courts.

It is further urged that the decision of the lower appellate court in affirming the judgment of the trial court, has decided a federal question, the "right of confrontation", in a way that is contrary to the decisions of this Court and in direct conflict with the applicable decisions herein cited, and calls for this Court to exercise its power of supervision over the lower courts. Rules of the Supreme Court, Title 28 U.S.C. Rule 19.

It has been clearly established that Title 18 U.S.C. 1010 does not measure up to the constitutional requirements as set forth in the decisions cited in this petition.

We urge the Court to grant the writ of certiorari so that the Court may consider these grave constitutional questions, in reviewing the decision of the appellate court in affirming the judgment of conviction in the trial court.

Respectfully submitted,

H. T. JORDAN, JR. and
GERVASE A. BRYANT
Petitioners

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APPENDIX

1. Decision of the United States Court of Appeals Tenth Circuit, affirming the judgment of the United States District Court for the Western District of Oklahoma

Filed, United States Court of Appeals, Tenth Circuit,

Dec. 5, 1966, Robert B. Cartwright, Clerk.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

SEPTEMBER TERM, 1966

No. 8450

H. T. JORDAN, JR., Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

No. 8451

GERVASE A. BRYANT, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

Carmon C. Harris of Oklahoma City, Oklahoma for Appellants.

Michael C. Stewart, Assistant U.S. Attorney, Oklahoma City, Oklahoma, (B. Andrew Potter, U.S. Attorney, Oklahoma City, Oklahoma, with him on the brief), for Appellee.

Before PHILLIPS and HICKEY, Circuit Judges, and BRATTON, District Judge.

BRATTON, District Judge.

III

H. T. Jordan, Jr., and Gervase A. Bryant were convicted on three counts of a twelve count indictment. Count 1 charged a conspiracy to knowingly make or cause to be made false statements to the Federal Housing Administration for the purpose of obtaining loans, in violation of Title 18 U,S.C. Sec. 371, and Counts 6 and 10 charged substantive counts of making or causing to be made, false statements to the Federal Housing Administration, in violation of Title 18 U.S.C. Sections 1010 and 2. Of the remaining nine counts, two were withdrawn from the consideration of the jury and not guilty verdicts were returned as to the others. Following conviction and sentencing defendants appeal.

Defendants were builders and sellers of homes, the purchases of which were financed by lending institutions upon loan guaranties of the Federal Housing Administration. Count 1 charges that the defendants conspired among themselves and with others to make or cause to be made false statements to the Federal Housing Administration, knowing such statements to be false. Fourteen overts acts were alleged under this count. Count 6 charges that the defendants made or caused one Hill to make a false statement as to the income of Hill in that it was represented that Hill was employed by the defendants' organization at an annual salary of $7,200.00, and that such false statement was made for the purpose of influencing the Federal Housing Administration to insure the loan on certain property. Count 10 charges that the defendants caused one Jackson to make statements to the Federal Housing Administration to the effect that he was trading his equity in certain property as a part payment on property which he claimed he was purchasing from the defendants and that he intended to occupy such property being puchased from the defendant; on appeal is that the evidence was insufficient to support the findings of guilty as to the three counts. Defendants urge that the evidence is insufficient to support the guilty verdicts as to the two substantive

counts, and that the defendants cannot be found guilty as to the conspiracy count since there was no direct evidence of the conspiracy and the only evidence offered was that which went to prove the substantive counts. They urge that if the defendants were found not guilty of all substantive counts charging offenses which the defendants were alleged to have conspired to commit they could not be guilty of the conspiracy, and particularly so when the Government relies upon the same evidence to prove the conspiracy and the substantive counts.

There is substantial evidence to sustain the verdicts of guilty by the jury as to the two substantive counts. As to Count 6, a finding by the jury that the statement that Hill was drawing a salary of $7,200.00 a year was false is clearly supported by the evidence. It is abundantly clear that during the several months he was employed by the defendants Hill drew no salary at all and at most may have earned in commissions $800.00. As to Count 10, Jackson testified that the defendants proposed to him that the house could be bought in his name and then transferred as an equity to someone else and that he never intended to move it. The reason he went along with the proposal was at the time the only source of income that he had was doing work for the defendants and he was afraid to say no to the proposition. This was more than sufficient to support the jury's finding of guilty on this count.

The gist of a criminal conspiracy is an agreement to violate a law of the United States and one or more overt acts by one or more of the conspirators to effect the objects of the unlawful agreement. The requisite overt act need not be substantive offense which is the object of the conspiracy. Indeed, it need not in itself be wrong. While intent to commit a substantive offense is an essential ingredient of the crime of conspiracy, the offenses are separate and distinct and proof of one is not necessarily proof of the other. *Carter v. United States,* 10 Cir., 333 F.2d 354.

The proof necessary to support a conviction for conspiracy is necessarily not direct. The nature of the offense and the secrecy involved require that the elements of the crime be established by circumstantial evidence, and the common purpose or plan may be inferred from the development or the combination of circumstances. *Baker v. United States*, 10 Cir., 329 F.2d 786; *Dennis v. United States*, 10 Cir., 302 F.2d 5; *O'Neal v. United States*, 10 Cir., 240 F.2d 700.

An appellate court does not weigh evidence in a criminal case but determines whether there is substantial evidence to support the verdict. *Wilder v. United States*, 10 Cir., 100 F.2d 177; *Seefeldt v. United States*, 10 Cir., 183 F.2d 713. There was evidence from which the jury could infer the agreement to knowingly make and cause to be made false statements to the Federal Housing Administration, and there was clear, and in many cases uncontradicted, evidence of the overt acts. Considering the evidence in the light most favorable to the appellee, there is substantial evidence to support the verdict as to the conspiracy count.

The defendants claim that the court considered an improper matter at sentencing. The record reflects that the court made this statement at sentencing:

> "Well, the Court has of course considered this case very carefully. At the same time Mr. Bryant was charged and plead, Mr. Jordan's brother did, too, and as developed in the evidence, Mr. Jordan's brother — not from the evidence but in the evidence — Mr. Jordan's brother was the lumberman furnishing H. T. Jordan materials to build these houses.
>
> "Also in the previous case, Mr. Jordan's brother was fined $3,000 for the same offenses or, yes, I

> guess it was the same offense, and Mr. Bryant was fined $1,000. They were not placed on probation and they took the payment of the fine very lightly."

It cannot be inferred from these statements of the trial judge that he was in anywise penalizing the defendants for any past delinquencies of Jordan's brother. The trial judge was simply noting that a fine in a similar case had, in the past, proven ineffective as a deterrent.

Implicit in the court's remarks is Jordan's knowledge of the previous involvement of his brother and his co-defendant in a similar offense. It is well settled that a trial judge, in passing sentence, may express his appraisal of the conduct of the defendant before him. *Montgomery v. United States,* 10 Cir., 344 F.2d 955; *Simmons v. United States,* 3 Cir., 302 F.2d 71.

The granting or denial of probation is within the discretion of the trial court and will not be reviewed absent a showing of abuse of discretion. *Humes v. United States,* 10 Cir., 186 F.2d 875; *Yates v. United States,* 10 Cir., 308 F.2d 737; *Thomas v. United States,* 10 Cir., 327 F.2d 795. There is no showing that the trial court was arbitrary or capricious or that he was motivated by improper considerations. The sentence is within the statutory limit and will not be disturbed. *Jones v. United States,* 10 Cir., 323 F.2d 864; *McMurray v. United States,* 10 Cir., 298 F.2d 619; *Smith v. United States,* 10 Cir., 273 F.2d 462.

AFFIRMED.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1166

H. T. JORDAN, JR., AND GERVASE A. BRYANT,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Western District of Oklahoma, petitioners were convicted of conspiracy and two substantive counts (of a 12 count indictment)[1] charging the making of false statements to the Federal Housing Administration (FHA) in violation of 18 U.S.C. 1010, 2 and 371 (R. 1–10).[2] Each of the petitioners was sentenced to imprisonment for 1 year on the conspiracy count; as to each the imposition of sentence was suspended on the substantive counts and

[1] Two substantive counts were dismissed and the jury found petitioners not guilty on seven other counts.

[2] "R." refers to the transcript of record prepared for the use of the court below.

259-829—67

petitioners placed upon probation for five years to commence upon the expiration of confinement (R. 10–13). The court of appeals affirmed, 370 F. 2d 126 (Pet. App. 2–6).

Petitioners were builders and sellers of homes, the purchases of which were financed by loan companies upon guaranties by the FHA. The government introduced at trial documentary evidence relating to such loans and the testimony of the various borrowers that petitioners induced or made false representations as to the borrowers' income, down-payment, intended occupancy, *etc.* (See R. 18–21, 22–26, 39–42).

1. Petitioners' contention in this Court that they have been fatally prejudiced by the admission at trial of hearsay testimony (a contention presented for the first time in a petition for rehearing below) is frivolous. They point to the testimony of loan applicants (named in a substantive count upon which imposition of sentence was suspended (Pet. 8–9) and in one overt act of the conspiracy count (Pet. 7–8)), as to advice imparted to them by representatives of the lending companies concerning the status of their accounts (Pet. 8–9). These passing references were obviously without significance in light of the false statements on various documents and the testimony of the various borrowers.

2. There is no merit in the attack on the constitutionality of 18 U.S.C. 1010 on the grounds that it does not allege that the Federal Housing Administration is an agency of the United States, fails adequately to distinguish between acts committed with lawful in-

tent as opposed to unlawful intent, and constitutes an abridgement of freedom of speech (Pet. 16–20).[3] As the Eighth Circuit said in *Syverson* v. *United States*, 342 F. 2d 780, 781, certiorari denied, 382 U.S. 961:

> * * * It [18 U.S.C. 1010] seems to us to be clear and plain on its face, capable of comprehension by a person of ordinary intelligence, neither vague nor indefinite, and directed to the performance of a carefully delineated material act intended to accomplish, through falsity, a specifically defined result affecting FHA action. * * *

See also *Shayne* v. *United States*, 255 F. 2d 739, 744 (C.A. 9), certiorari denied, 358 U.S. 823.

---

[3] 18 U.S.C. 1010 provides:

"Whoever, for the purpose of obtaining any loan or advance of credit from any person, partnership, association, or corporation with the intent that such loan or advance of credit shall be offered to or accepted by the Federal Housing Administration for insurance, or for the purpose of obtaining any extension or renewal of any loan, advance of credit, or mortgage insured by such Administration, or the acceptance, release, or substitution of any security on such a loan, advance of credit, or for the purpose of influencing in any way the action of such Administration, makes, passes, utters, or publishes any statement, knowing the same to be false, or alters, forges, or counterfeits any instrument, paper, or document, or utters, publishes, or passes as true any instrument, paper, or document, knowing it to have been altered, forged, or counterfeited, or willfully overvalues any security, asset, or income, shall be fined not more than $5,000 or imprisoned not more than two years, or both."

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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BEATRICE ROSENBERG,
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Supreme Court of the United States

No. 1166, October Term, 1966

H. T. JORDAN, JR., and GERVASE A. BRYANT

Petitioners,

VERSUS

UNITED STATES

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR REHEARING

(s) _____

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May, 1967

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Supreme Court of the United States

No. 1166, October Term, 1966

H. T. JORDAN, JR., and GERVASE A. BRYANT

Petitioners,

VERSUS

UNITED STATES

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR REHEARING

TO THE HONORABLE EARL WARREN, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES, OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners, H. T. Jordan, Jr., and Gervase A. Bryant, pray that this Honorable Court grant a rehearing herein and vacate the order made on May 8, 1967, denying their petition for a writ of certiorari to the United States Court of Appeals Tenth Circuit.

JURISDICTION

That the petitioners invoke the jurisdiction of the Court to file this petition for a rehearing, under the provisions of the Rules Of The Supreme Court Of The United States, 28 U.S.C.A. Rule 58, subsection 2.

OPINIONS AND ORDERS

That the trial court wrote no opinion. That the opinion of the appellate court affirming the judgment of the District Court, is appended to the petition for a writ of certiorari, and is officially reported in 370 F2d 126.

That this Court entered an order on May 8, 1967, denying the petition for a writ of certiorari.

That petitioners made application for an order staying notification of the denial order, and on May 13, 1967, this Court entered an order staying the issuance of the order denying the petition for writ of certiorari, pending the timely filing and disposition of a petition for a rehearing.

QUESTIONS PRESENTED

1. Is there a substantial failure of proof of the government in chief where there is no proof to establish a valid connection between the corpus delicti and the defendants named in the indictment?

2. Is there a substantial variance between the allegations of the indictment and the proof of the government that affects the material rights of these petitioners?

3. Where the government failed to offer competent proof, in chief, to sustain the material allegations of the indictment; would not the exercise of sound judicial discretion require the trial court to take judicial notice of the plain error and thereby cause the court to take corrective action to protect the rights of the accused?

4. In the administration of criminal justice, should this Court order a remand to the trial court for a hearing and completion of the record of the trial proceedings?

CONSTITUTIONAL PROVISIONS INVOLVED

FIFTH AMENDMENT:

Pertinent provisions as follows:

"* * * nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb * * *"
"* * * nor be deprived of life, liberty, or property, without due process of law."

SIXTH AMENDMENT:

Pertinent provisions as follows:

"In all criminal prosecutions, the accused shall enjoy the right to a * * * public trial; * * * and to be confronted with the witnesses against him; * * * and to have the assistance of counsel for his defense."

STATUTE INVOLVED

28 U.S.C.A. 753 (b) (1)

RULES OF CRIMINAL PROCEDURE INVOLVED

28 U.S.C.A. Rule 52 (b):

> "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the Court."

RULES OF THE SUPREME COURT INVOLVED

28 U.S.C.A. Rule 19, 1 (b).
28 U.S.C.A. Rule 40 (2).

STATEMENT

Petitioners were convicted by a jury on a plea of not guilty, in the United States District Court for the Western District of Oklahoma, on counts one, six and ten, of a twelve count indictment for the violation of the Statutes 18 U.S.C.A. 371, 1010 and 2. That they each were sentenced to one (1) year imprisonment on the conspiracy count and they were placed on probation for five (5) years on the two substantive counts. (R 10, 11, 12 and 13)

The petitioners were correctly identified in the indictment as H. T. Jordan, Jr., and Gervase A. Bryant, respectively, (R 1-9); whereas, the proof of the government in chief at the trial (R I-132) identified the accused persons only as Hank Jordan and Dick Bryant, (R 16, 17, 66; 22, 25, 31, 81, 82; 34, 35, 36, 37, 39, 42 and 120) (See pages 5, 6, 7 and 8 of this petition)

ABSTRACT OF EXCERPTS OF THE TESTIMONY OF GOVERNMENT WITNESSES IN CHIEF (R 1-132)

These quotations illustrate that the government's proof in chief as to identifying these petitioners as being the accused, was at variance with the indictment, and wholly fails to connect petitioners with corpus delicti:

R 16:

"BRUCE D. MILLER, called as a witness on behalf of the government, being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Parr) State your name.

A. Bruce D. Miller.

Q. Do you live at 201 Epperly Drive?

A. No, sir. We have moved to two miles east of Moore.

Q. Did you ever work for Hank Jordan and Dick Bryant?

A. Yes, sir."

"Q. And when you went to work for Hank Jordan what did you do?

A. Wiring houses and electrical contractor.

Q. Did you wire houses for Hank Jordan and Dick Bryant at the Beacon Realty Company?

R 17:

"Q. That house in Harrah, did you trade that in on a house from Dick Bryant and Hank Jordan?

A. Yes, sir.

Q. What was the address of the house you bought from Hank Jordan and Dick Bryant?

A. 1817 Melody Drive."

"Q. Did Hank Jordan allow you enough on the Harrah house for down payment and closing on the house at 1817 Melody Lane?

A. Give me that again."

On Plaintiff's Exhibit 1b:

R 66:

"Beacon Realty Co., Inc.

By Dick Bryant"

R 22:

"HOMER HILL, JR., called as a witness on behalf of the government, being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Parr) State your name.

A. Homer Hill, Jr.

Q. Where do you live?

A. I live at Jones, Oklahoma."

"You are married to Dick Bryant's wife sister?

A. Yes, sir."

R 25:

"Q. And when they got to the office they talked to Dick Bryant or Hank Jordan?

A. I made the appointment for Mr. Bryant to go see them, and I went with him to see them on both occasions."

R 31:

"Q. (By Mr. Parr) Mr. Hill, did you testify Dick Bryant had you get an employment verification from the Wicher Baptist Church?

A. "Yes, sir."

R 81:

"Plaintiff's Exhibit 5"

"Seller: Dick Bryant
Beacon Realty Co., Inc."

R 82:

"Beacon Realty Co., Inc.
By Dick Bryant"

R 34:

"THOMAS FRANKLIN JACKSON, called as a witness on behalf of the government, being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Parr) State your name.

A. Thomas Franklin Jackson."

"Q. Do you know Dick Bryant and Hank Jordan?

A. Yes, sir."

"Q. You worked for him in March of '59. How did you happen to meet Hank Jordan?

A. The Midwest Paint and Flooring Company was working on a house they were building?

R 35

"Q. When you and Marvin McEntire were working there then how did you happen to meet Hank Jordan?

A. That particular day?

Q. Yes.

A. He come in while we were working in this house; just come in."

R. 36:

"Q. Who owned the Beacon Realty Company?

A. Hank Jordan as far as I could tell; a partnership, Hank and Mr. Bryant.

Q. Dick Bryant?

A. Yes."

R. 37:

"Q. I will ask you if you paid Dick Bryant three hundred dollars in cash on January 13, 1960?

A. No, sir."

R. 39:

"Q. Whom did you talk to?

A. Hank Jordan."

R 42:

"Q. You say Mr. Hank Jordan suggested you go in business for yourself. Is that right?

A. That is right."

R. 120:

"Beacon Realty Co., Inc.
By Dick Bryant"

"Beacon Realty Co., Seller
Dick Bryant, Seller"

UNUSUAL COURT PROCEEDINGS

During the course of the trial, the prosecuting attorney sought to introduce in evidence hearsay testimony. Defense counsel timely interposed an objection. The government attorney approached the bench and, out of hearing of the jury, these petitioners and the court reporter, made undisclosed, secret and off the record disclosures to the trial court, which secret disclosures prompted the court to overrule the petitioners' objections to the hearsay evidence; and the departure from the usual course of procedure is set forth, as follows:

R 18, 19:

(Bruce D. Miller, having been called as a witness on behalf of the government, was being examined by the prosecuting attorney, Mr. Parr)

"Q. Explain the communications from the Oklahoma National Mortgage Company. What did they pertain to?

MR. HARRI: Object to that as incompetent, irrelevant and immaterial. It would not be binding on us.

THE COURT: What is the point Mr. Parr?

MR. PARR: I will approach the bench and state it off the record if you like.

THE COURT: Very Well.

(Conference at bench between court and respective counsel of the record, and open proceedings resumed, as follows):

THE COURT: Overruled.

Q. (By Mr. Parr) Did anybody from the Oklahoma National Mortgage Company come out to see you with reference to 1817 Melody Drive property?

A. They called me on the telephone.

Q. What did they say to you?

A. They said the payments were three months behind and if the payments were not brought up to date they were going to start foreclosing proceedings. I made up the points on it, and Mr. O'Toole of the Oklahoma National Mortgage Company suggested that I try to get the deed straightened out, and he gave me a list of the deeds he needed to get it brought up to date, and I got them all, made the payments and the next day he called me and said there was one deed I got when I cleaned this up. He said the deed I gave the Beacon Realty Company had been put up for an $1800.00 loan, and if I would pay the $1800 he would give me a clear deed to the property."

POINTS TO BE URGED

1. The proof of the government in chief, at the trial, failed to connect these petitioners with the offenses alleged in the indictment.

2. That there is a variance existing between the allegations of the indictment and proof of the government, which very materially affects the substantial rights of the petitioners.

3. Plain error occurring at the trial which would have required the trial court, in the exercise of sound judicial discretion, to take corrective action to protect the rights of the accused in a federal court of justice.

4. In the alternative, petitioners, urge that in the administration of criminal justice, this Court should remand the case to the lower court so that the trial court may conduct further proceedings to correct and complete the trial record, to the end that it disclose certain "off the record" proceedings had before the trial court.

REASONS FOR GRANTING THE PETITION FOR REHEARING

This petition for a rehearing is not presented as an empty formality, but is presented to this Honorable Court in good faith and on the basis that petitioners contentions have great merit. The contentions herein urged will be restricted to substantial grounds that are avaialble to these petitioners, but not previously presented to this Court: which contentions are anchored upon constitutional guarantees, and are set forth as follows:

1. The proof of the government in chief, at the trial, failed to connect these petitioners with the offenses alleged in the indictment.

2. That there is a variance existing between the allegations of the indictment and proof of the government, which very materially affects the substantial rights of the petitioners.

3. Plain error occurring at the trial would require the trial court, in the exercise of sound judicial discretion, to take corrective action to protect the rights of the accused in a federal court of justice.

It has been clearly pointed out that the indictment names H. T. Jordan, Jr. and Gervase A. Bryant as the defendants. (R 1-9) (4th page of this petition)

It has been positively shown, by excerpts from the record, that the proof of the government in chief named one Hank Jordan and one Dick Bryant as the sole offenders of the statutes and offenses named in the indictment. (R 16-132) (Page 5 herein)

Therefore, it becomes very apparent that the allegations in the indictment and the proof of the government do not correspond.

We have a very novel question of federal law, which is of great importance in the administration of criminal justice.

The Sixth Amendment requires that the accused shall be definitely informed as to the charges against him. The Fifth Amendment guarantees one against being put in jeopardy twice. The decisions of our courts compel the prosecution to prove every material allegation of the indictment.

In the instant case we have H. T. Jordan, Jr. and Geryase A. Bryant named as the defendants and offenders of the statutes. The proof of the government at the trial established that one Hank Jordan and one Dick Bryant committed the offenses charged in the indictment.

We are presented with this novel question of federal law: Was it the duty of the trial court to take judicial notice

of this obvious error and to take necessary action to protect the accused on trial in a federal court of justice?

Petitioners point out that the trial court should have taken positive action to protect their rights. Such protective action would be within the spirit of the "due process of law" clause, as guaranteed to them in the Fifth Amendment. It would protect the integrity of the courts and be in the interest of a strong public policy. It would be in line with the principle announced in the cited cases herein.

As in the instant case; we cite from an applicable situation as found in *United States v. Atkinson*, 297 U.S. 157, 56 S. Ct. 391, wherein the doctrine of plain error is approved, and we quote from said opinion:

> "In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings."

Plain error of constitutional dimensions, for example, will ordinarily be considered prejudicial per se. The standard to be applied on review was formulated in the leading case of *Kotteakos v. United States*, 328 U.S. 750, 764-765, 66 S. Ct. 1239, 90 L.Ed. 1557, wherein the Court reversed convictions for conspiracy on the ground that pleading of one conspiracy and the proof of several constituted a prejudicial variance.

To the same effect on the Plain Error Rule, see *Fiswick v. United States*, 329 U.S. 211, 218, 67 S. Ct. 224, 91 L. Ed. 196; *Krulewitch v. United States*, 336 U.S. 440, 69 S. Ct. 170, 93 L. Ed. 790; *Bihn v. United States*, 328 U.S. 633, 638, 639, 66 S. Ct. 1172, 90 L. Ed. 1485.

It has been positively established by the record set forth herein that there was a substantial failure of the proof of the government in chief to support a valid connection between the corpus delicti and these petitioners as they were correctly identified and named in the indictment.

There can be no doubt about the existence of a substantial variance between the material allegations of the indictment and the proof of the government in this respect; and we repeat that the petitioners were named in the indictment as H. T. Jordan, Jr. and Gervase A. Bryant, whereas the proof of the government, in chief, established that a Hank Jordan and a Dick Bryant, were the sole offenders of the law.

We have pointed out that the record definitely shows that the prosecution failed to meet the burden of proof to prove all the material allegations of the indictment against these appellants.

It is a general rule of law and consistently aproved by this Court, that:

> "allegations and proof must correspond is based on requirements that accused shall be definitely informed

as to charges against him, and that he may be protected against another prosecution for the same affense. *Berger v. U. S.* 55 S. Ct. 629. Also in *Bennett v. U. S.* 33 S. Ct. 288.

The prosecution must prove guilt as charged in the indictment. *U.S. v. Ansani*, 138 F. Supp. 454; affirmed in 240 F2d 216, Cf. *Milner v. U.S.*, 77 S. Ct. 813.

It is pointed out that in the instant prosecution, the burden of proof belonging to the government failed, and it is pointed out that where, as in the instant case, the defendant pleads not guilty, he places upon the government the burden of proving all essential facts alleged, whether they be characterized as jurisdictional or otherwise, and it was so held in *U.S. v. Holland*, 264 F2d 346, certiorari denied, 80 S.Ct. 98.

In the instant indictment the defendants are identified as H. T. Jordan, Jr. and Gervase A. Bryant. We challenge the record to show where in the evidence in chief these two accused individuals were so identified by the proof of the government. (R 16-132), (See pages 5, 6, 7 and 8 herein)

The prosecution offered evidence which names a Jim Jordan (R 42), Mr. Hank Jordan and Dick Bryant; but nowhere in this proof in chief do we find any evidence whatsoever to identify these two petitioners who are named in the indictment, namely: H. T. Jordan, Jr. and Gervase A. Bryant. (R 16-132)

Proof that is at a variance with and inconsistent with the indictment, as in the instant case, is fatal, because it affects the substantial rights of these petitioners. C.J.S. Criminal Law 1428 and 1452.

A misnomer is giving incorrect name to person in accusation, indictment, pleading, or other instrument. *Culpepper v. State*, 161 S.E. 623.

Webster's Third International Dictionary, on page 1444, defines mishomer as follows:

"Misnomer To Call by wrong name."

Black's Law Dictionary, Fourth Edition, on page 1151, defines misnomer to be:

> "Mistake in name, giving, incorrect name to person in accusation, indictment, pleading, deed or other instrument. *Culpepper v. State*, 161 S.E. 623."

It is pointed out that the danger of double jeopardy attaches in the instant case.

The doctrine of *'idem sonans'* is to identify party in evidence as party named in the indictment. *Mates v. State*, 165 N.E. 316.

It is settled law that where the information or indictment charges that an offense has been committed by one person and proof shows the offense was committed by another,

there is a fatal variance. This would be true if there was any reasonable doubt thereof, because the danger of double jeopardy would attach.

A variance arises, as in the instant case, "when the evidence shows that facts proven do not support, but are different from averments in the pleadings". *Fox v. U.S.*, 45 F2d 364.

It was held in *U.S. v. Wills*, that a variance in a criminal prosecution is an essential difference between the accusation and the proof. This is the fact situation in the instant case at bar.

It was held to be a fatal variance where the indictment charged an assault on one J. B. Denby, and the proof showed the assault was upon one J. M. Dendy, 266 S.W. 419.

In another applicable case, the indictment alleged one "Manian" with an offense, the proof showed that his name was "Mananianian". Held to be fatal variance. 137 N.E. 394.

Likewise, it was held that double jeopardy would attach where the indictment alleged that Samuel Horn defrauded John Adams, and the evidence showed that Sidney Horn defrauded Joseph Adams, 6 S.W. 96.

It is submitted that the prosecution failed in its evidence in chief to prove the material allegations of the indictment, and this was plain error.

Therefore, petitioners point out to this Court that where the government wholly failed to offer competent proof, in

chief, to sustain the material allegations of the indictment, it would be incumbent upon the trial court, in the exercise of sound judicial discretion, to take judicial notice of the plain error and require a court of justice to take corrective action to protect the rights of the accused on trial in a federal court.

Next, these petitioners contend that plain error occurred during the course of the trial which materially affected their substantial rights, when the prosecuting attorney made certain unreported disclosures, in open court, to the trial judge, for the sole purpose of inducing and swaying the court to make a favorable ruling on the objetcion of defense counsel to the introduction of prejudicial heresay testimony. (R 18, 19) (Page 9 of this petition)

Petitioners urge that in the administration of criminal justice, this Court remand the case to the lower court to correct and complete the trial record, to the end that it disclose certain "off the record" proceedings had before the trial court.

This contention is based squarely upon a statutory provision found in the Court Reporters Act, 28 U.S.C.A. 753(b)(1). The applicable provisions of the statute are as follows:

> "(b) One of the reporters appointed for each court shall attend at each session of the court and at every other proceedings designated by rule or order of the court or by one of the judges, and shall record verbatum

by shorthand or by mechanical means which may be augmented by alectronic sound recording subject to regulations promulgated by the judicial conference: (1) *All proceedings in criminal cases had in open court.* (emphasis ours)

In *Parrott v. U.S.*, 314 F2d 46 (10th circuit) it was held:

"Unavailability of full transcript because of failure of court reporter to transcribe voir dire examination as required by this section made it impossible for reviewing court to determine whether statement by trial court in voir dire that three other charges of bank robbery were pending against defendant was harmless and to be disregarded ,and, accordingly, the conviction was required to be reversed and the case remanded for a new trial."

In *Fowler v. U.S.*, 310 F2d 66, (5th Circuit) it was held:

"Where in Federal prosecution for unlawful purchase and sale of heroin, no transcript of the record had been made of argument of counsel and where reviewing court was therefore unable to determine whether attorney had made prejudicial comment requiring reversal, new trial was mandatory."

In *U.S. v. Taylor*, 303 F2d 165 (4th Circuit) the Court held:

"Failure to keep complete records of criminal proceedings may be considered in collateral proceedings in determining whether defendant is entitled to hearing on motion to vacate sentence and in determining whether sentence should be vacated."

In *Stephens v. U.S.*, 289 F2d 308 (5th Circuit) it was held:

"Failure of court reporter to record proceedings in open court in prosecution for violation of Mann Act, Section 2421 required new trial."

Petitioners pray that this Court, in the administration of federal justice, order this matter remanded to the trial court for further proceedings to complete and supplement the record pertaining to the so-called "off the record" proceedings (R 18, 19), wherein the prosecuting attorney, in the course of the trial, wrongfully made certain disclosures to the court out of the hearing of the jury, the petitioners and the court reporter, for the sole purpose of inducing the trial court to make a favorable ruling on an objection by opposing counsel to the introdutcion of "hearsay evidence"; which unrecorded disclosures of said prosecuting attorney did influence the court and caused the court to make an unusual departure from the usual and accepted course of judicial procedure and permitted impermissible evidence to go to the jury, to the substantial prejudice of the petitioners. (Page 10 herein)

It is urgently pointed out that upon the correction and completion of the record to include these secret disclosures, this Court could fully consider whether or not the prosecuting attorney's disclosures were a valid reason for this unusual departure of the trial court from the accepted and usual course of procedure, and whether or not these disclosures were justified and proper when weighed against the denial of the petitioners' constitutional right of confrontation and cross-examination of the witness testifying against them at the trial. Fifth and Sixth Amendments: Rules of The Supreme Court, 28 U.S.C.A. Rule 19, 1(b); *Gordon v. U.S.*, 414, 73 S. Ct. 369; Federal Rules of Criminal Procedure, 28 U.S.C.A. Rule 26.

It is pointed out that fundamental fairness has now been positively denied to these petitioners by reason of the trial court's failure to have required the court reporter to have performed his statutory duty and thereby preserved for the record the secret and undisclosed statements made to the trial judge, in open court, but without the hearing of the jury, these petitioners and the court reporter. These unrecorded statements were intended to and did sway and persuade the trial court to permit impermissible evidence to be considered by the jury without giving these petitioners an opportunity to cross-examine their accusors. How can this Court determine the issues without a full record? This novel question of federal law has not been before this Court for a determination, however, a number of circuit courts have held that it is mandatory that the court reporter make a full and complete record of all proceedings had in open court in a criminal prosecution. On the other hand these decisions are in direct conflict therewith: *Stirone v. U.S.* 314, Fed. 2nd. 253, (3rd Cir); *Addison v. U.S.*, 317 Fed. 2nd. 808, (5th Cir.); *Brown v. U.S.*, 314 Fed. 2nd. 293, (9th Cir.).

CONCLUSION

Petitioners have clearly pointed out to the Court, in support of their petition for a rehearing, that plain error occurred at their trial, which very materially affected their substantial rights to their prejudice.

This novel and conflicting federal question, as to whether or not it is a statutory duty and, therefore, mandatory that the federal court reporter must make a record of all the proceedings had in open court, is a very vital question of public importance and it should be decided by this Court, because of the conflicting decisions of the various Circuit Courts.

It is respectfully submitted that the relief sought herein should be granted to these petitioners.

(s) _____

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May, 1967

CERTIFICATE

Howard K. Berry, Jr. certifies that the foregoing petition for a rehearing is presented in good faith and not for delay. That the federal questions of law presented are restricted to substantial grounds available to the petitioners and not previously presented to this Court.

Dated this 26th day of May, 1967.

(s) _____

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Counsel for Petitioners